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[illegible] MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

[illegible]PATRA HASLIP, ET AL.,
Respondents

[illegible] to the Supreme Court of Alabama

[illegible] INSURANCE CONSUMER [illegible] *CURIAE* IN SUPPORT [illegible]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner

v.

CLEOPATRA HASLIP, *ET AL.*,
Respondents

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF NATIONAL INSURANCE CONSUMER ORGANIZATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

With the consent of the parties, the National Insurance Consumer Organization respectfully submits this brief as amicus curiae in support of respondents. Copies of letters of both parties confirming this consent have been filed with this court.

The National Insurance Consumers Organization (NICO) is a non-profit, non-partisan consumer organization with approximately 2,000 individual members. It is the only national consumer organization which devotes its full time to insurance issues. It was founded in 1980 by J. Robert Hunter, Federal

Insurance Administrator under Presidents Ford and Carter, who is NICO's president and a member of its Board of Directors. NICO's other directors are Howard Clark, former South Carolina Insurance Commissioner, and James Hunt, former Vermont Insurance Commissioner.

NICO receives frequent complaints from its members and other insurance policyholders about alleged misconduct by insurance companies. It is NICO's purpose to suggest various remedies that such policyholders may have, as well as to recommend and advance public policy in the insurance consumer's interest.

As is discussed in this brief, the insurance industry, free from federal regulation and subject to governmental control only by relatively weak state insurance departments, is only truly regulated by court action in individual tort claims, especially where such state court causes of action carry the threat of punitive damage awards to punish and deter corporate misconduct. Because petitioner in the present case seeks to impose strict limits on punitive damages, the only truly effective weapon available to insurance consumers in their struggle for fair claims treatment, NICO and those it represents have a direct and substantial interest in this case.

NICO files this brief to bring to the Court's attention the crucial importance of punitive damages to insurance consumers across the country.

Amicus is concerned that the position taken by petitioners and amici counsel in support of appellants, is another attempt to tamper with state tort law remedies which have been the only effective means of curbing oppressive insurance claims practices and deterring other commercial torts.

SUMMARY OF ARGUMENTS

Punitive damages have developed as the most effective means by which the states can protect their citizens against corporate misconduct. They have been especially important in controlling the powerful and largely unregulated insurance industry. Punitive awards are the only effective manner of punishing and deterring wide spread claims abuses by the industry. Further, the cost of such regulation is borne not by society, but by the wrongdoers themselves. Punitive assessments provide the incentive for individual victims and their attorneys to take on an opponent for whom they would otherwise be no match.

While the benefits to insurance consumers derived from punitive awards are great, evidence shows that the cost of such awards to the industry as a whole is minimal. Though the insurance industry has engaged in a massive public relations campaign to persuade the public, and now this Court, that punitive damage payments are out of control, the empirical evidence proves otherwise. Far from creating any sort of "crisis" in the insurance industry, such damage assessments by state courts are playing a crucial role in reforming long standing claims abuses.

It is abundantly clear that the real objection to punitive damages by Petitioner and the large amici corporations is simply that large amounts of money are involved when juries attempt to punish and deter malicious, oppressive or outrageous conduct. For if they truly believed that due process of law requires strict federal standards to limit a jury's discretion, to provide notice of and uniformity regarding the amount of verdicts, then Petitioners and amici would argue that such standards must apply not only to punitive damages, but to compensatory damage awards for pain and suffering or emotional distress as well. The adoption of stricter federal standards for

assessments of punitive damages would throw the entire tort system into chaos as all assessments for pain and suffering or emotional distress would immediately be appealed under the same theory that due process requires such stricter standards to these types of damages.

In addition, for this Court to find that due process of law requires stricter standards for punitive damage awards, it must overrule every appellate court that has ever considered the question. State courts, and most recently the Fifth Circuit Court of Appeals, have uniformly rejected the due process argument either because the constitutionally-mandated safeguards provided in criminal actions do not apply to private civil actions not involving the state, or because the safeguards already in place are sufficient to pass due process muster.

ARGUMENT

I. PUNITIVE DAMAGES HAVE DEVELOPED AT THE STATE LEVEL AS THE ONLY EFFECTIVE PROTECTION AGAINST FRAUD AND OPPRESSION BY CORPORATE GIANTS.

Governmental sanctions over the years have been notoriously inadequate in curbing corporate wrongdoing. This is no doubt due, in part, to a corporation's immunity from the threat of criminal prosecution's principal inherent weapons: loss of liberty and personal humiliation. In those rare cases where individual officers of corporations have been prosecuted, punishment has been woefully lax in comparison with the enormous amounts of money to be gained by wrongful activity. A study in U.S. News and World Report entitled *"Corporate Crime —The Untold Story,"* September 6, 1982, at 25-28; states:

> In comparison with the prison terms routinely dealt out to robbers and muggers, corporations and their executives, like other white-collar criminals, get off easy. Most offenses with which corporations are charged carry low fines that have not changed in years and, at worst, are minor irritants.
>
> . . .
>
> When Westinghouse Electric Company pleaded guilty in 1978 to charges involving bribery of an Egyptian official, the maximum fine was $300,000—one percent of the value of the 30-million-dollar contract it had obtained.
>
> . . .
>
> Even when convicted and punished, it is not unusual for an executive to be welcomed back into the company's hierarchy.

In the corporate world, as everywhere else, there are examples of good and bad conduct. As stated by Robert Miles, Associate Professor of Business Administration at Harvard University, "some firms are 'real Neanderthals,' money-grubbing and ethically insensitive, while others are law-abiding and socially conscious." Id.

> In certain areas, misconduct has been especially widespread:
>
> In a few instances, almost entire industries have been caught breaking the law.
>
> . . . .
>
> When a corporation gets into trouble, whether the charge is price fixing, bribery, kickbacks, tax evasion or pollution, the frequent explanation is: "Everybody does it." It is an idea that soothes the consciences of the culprits, and sometimes it is almost literally true. (Id.)

In such situations, where a corporate defendant has acted,

and continues to act, in violation of the rights of a large group of people solely for the calculated purpose of making more money, punitive damage awards by state courts are the only effective remedy. In *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 233 N.Y.S.2d 488 (1961), the Court observed:

> [T]hose who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Id., 10 N.Y.2d at 406, 179 N.E.2d at 499, 233 N.Y.S.2d at 492. See also, *Boise Dodge v. Clark*, 92 Idaho 902, 453 P.2d 553 (1969).

This Court has also recognized the legitimate deterrent effect of punitive damages:

> Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 161, 87 S.Ct. 1975, 1994, 18 L.Ed.2d 1094 (1967).

As discussed in the following section, the principles cited above are especially applicable to the insurance industry.

II. PUNITIVE DAMAGES UNDER STATE TORT LAWS ARE AN EFFECTIVE MEANS OF DETERRING CORPORATE MISCONDUCT AND THE ONLY REALISTIC PROTECTION FOR CONSUMERS FROM DISHONEST AND OPPRESSIVE INSURANCE PRACTICES.

The increase in punitive damage assessments against corporations can, in large measure, be attributed to the increase in insurance bad faith litigation[1] From the reported cases is evident that fraudulent, malicious and oppressive conduct by insurance carriers runs rampant.

Sometimes the attitude of the companies is one of defiance and contempt when courts try to encourage fair and reasonable claim practices. In *Tibbs v. Great American Ins. Co.*, 755 F.2d 1370, 1376 (9th Cir. 1985), the company's response to the judge's advice to provide legal defense on a claim, was "F--- the Judge," and "no court of law is going to tell us what to do." Punitive damages can help remove an aura of arrogance and insolence that has permeated the industry.

The insurance industry has remained free of federal regulation through the McCarran-Ferguson Act, 15 U.S.C. Sections

[1]E.g.: A study of jury trials in San Francisco and Chicago concluded that an overall increase in the number and size of punitive damage awards between 1975 and 1985 was overwhelmingly accounted for by business and contract cases—most notably insurance bad faith cases. Rand Institute for Civil Justice, "*Punitive Damages: Empirical Findings*" (1987) reported in Liability Week, March 30, 1987.

1101-15, which effectively eliminated federal regulation by transferring responsibility to the states.[2]

State insurance departments frequently have neither the willingness nor the ability to meaningfully regulate insurer conduct.[3] When insurance companies engage in misconduct, according to a study of state insurance regulation by the United States General Accounting Office in 1979, "the authority of departments to order corrective action is very limited." *United States General Accounting Office, "Issues and Needed Improvements in State Regulation of the Insurance Business,"* at ii (1979);. In addition, as the GAO rather delicately put it, "insurance regulation is not characterized by an arms-length

[2]In *Paul v. Virginia*, 75 U.S. 168 (1868), this Court removed insurance from the field of federal regulation through the Commerce Clause, thereby leaving the matter to the state courts and state insurance commissioners. Ashley, Bad Faith Actions, Sec. 9:02, explains that thereafter:

> The latter proved ineffective in controlling insurance abuses: the commissioners usually came from the ranks of the insurance industry and, after short tours of duty, returned to the companies they had regulated.
>
> In 1944, however, the Supreme Court issued its decision in United States v. South-Eastern Underwriters Association This decision sent shivers down the spines of insurance company executives, who feared the prospect of federal agencies, particularly the Federal Trade Commission, interfering with the insurers' cozy relationships with the state insurance commissioners.
>
> The insurance industry devised an ingenious plan to head off federal regulation. It persuaded Congress to introduce legislation, known as the McCarran-Ferguson Act. . .

[3]E.g: At least 39 states have enacted some form of Unfair Claims Practices legislation, which, ironically, was originally lobbied for by the insurance industry to substitute for and forestall federal regulation. J. McCarthy, *Punitive Damages in Bad Faith Cases* (4th Ed. 1987), at vi. These statutes proscribed many of the same types of insurer conduct that have been the subject of common-law bad faith litigation, but the statutes only provide as sanctions relatively minor fines payable to the state and lack express provisions for private enforcement. Id.

relationship between the regulators and the regulated," with insurance commissioners typically coming from and returning to the industry. Id. at vii.

As noted by the *Controller General's Report to the Congress of the United States*, PAD 79-72, Oct. 9, 1979; an in-depth study of the inability of state insurance departments to properly regulate the industry, the insurance industry is simply too large for any state administrative agency to control. Similarly, an investigation entitled *N.B.C. Reports: "Protection for Sale; the Insurance Industry,"* dated April 17, 1982, revealed:

> WE FOUND ALMOST EVERYWHERE WE WENT — STATE REGULATORS DOING AN INEFFECTIVE JOB. THE FEDERAL GOVERNMENT HAS SHOWN FOR DECADES THAT IT HAS LITTLE INTEREST IN GETTING INVOLVED. AND SO, CONSUMERS END UP HAVING TO TAKE ON THIS SPRAWLING INDUSTRY LARGELY BY THEMSELVES. IT IS NOT A FAIR MATCH. . . . (Capitalization in original.)

Id. at 74.

Because of the lack of effective oversight of insurance claims practices by government, punitive damages are the only real deterrent to malicious and oppressive conduct by insurance companies, just as they are the only meaningful punishment for such conduct. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with virtual immunity. See *Walker v. Sheldon, supra*. Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1185-88 (1931), (recommending punitive damages "where the risk of having to pay compensation probably would not discourage the commission of wrongs.")

Insurance practices as disclosed by reported cases can only be described as shocking in view of the fact that it is an industry affected with a public interest, an industry which promises that it will afford protection in a time of need. The courts have assessed punitive damages based on conduct which was dishonest, malicious and outrageous: *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz. 1987); [For over 18 years the company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would probably not object to these small deductions]; *Moore v. American United Life Ins. Co.*, 197 Cal.Rptr. 878, 150 Cal.App.3d 610 (1984); [Disability insurance benefits denied by use of misleading and deceptive settlement practices firmly grounded in an established company policy that had the potential of defrauding countless insureds other than plaintiff]; *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984); [A large judgment in excess of liability policy limits when "Allstate wilfully manipulated its own client," and "deliberately concealed adverse reports . . . from their own insured"]; *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972); [Life insurer's practice was to not pay meritorious claims and to use "economic coercion" to "compromise" valid claims.] *Delos v. Farmers Ins. Group, Inc.*, 155 Cal.Rptr. 843, 93 Cal.App.3d 642 (1979); ["Nefarious scheme to mislead and defraud thousands of policyholders."]

Punitive damages help to give policyholders some semblance of protection. The importance of punitive damages is summarized in an article entitled, *"Insurance Company Bad Faith Law — A Potent Weapon for Consumer Protection,"* by William M. Shernoff, Trial, May 1981, at 24, as follows:

> [T]he imposition of punitive damages in a handful of bad faith cases in California has without a doubt generated a more thorough review by the insurance industry of its claims practices than was accomplished by ten years of legislative efforts to regulate insurance claims practices. . .

Punitive damages have played an "increasingly significant role in protecting contemporary society from many nonregulated or inadequately regulated businesses and industries . . . ." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 615 (1979). These societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society.

Through punitive damage assessments, the corporate wrongdoer is forced to reward the consumer for his public service of bringing that wrongdoer to justice. *Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 269 (Miss. 1985), aff'd 108 S.Ct. 1645 (1988): The "reward" function of punitive damages is especially important in insurance cases where compensatory damages alone are not of sufficient magnitude to make it economically feasible for a lawyer to pursue the case, or for a plaintiff of modest means to pay expenses in connection with the case — particularly in view of the ability of insurers, with resources thousands of times greater than the plaintiff's, to simply wear him down during the course of litigation.

The public service performed by plaintiffs who bring insurance bad faith cases is enormous: they encourage insurance companies to deal more fairly with their policyholders. For example, in 1970 the California Court of Appeals upheld a punitive damage judgment against an insurer which had sought to induce a disabled policyholder into surrendering his policy by writing him false and threatening letters. *Fletcher v. Western National Ins. Co.*, 89 Cal.Rptr. 78 (App. 1970). Soon thereafter, two insurance company lawyers wrote an article advising insurers that *Fletcher* made it imperative for them

to be cautious and fair in handling claims, since "any deviations from ethical business practices will subject them to harsh reprimands."[4] Keenan and Gillespie, *The Insurer and the Tort of Intentional Infliction of Mental Distress*, 39 Ins. Couns. J. 335 (1972); Similarly, a 1976 article in an insurance journal suggested nine steps, including making full disclosure to the insured and paying claims promptly, that insurers should take to avoid bad-faith punitive damage verdicts.[5] Kornblum and Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 Best's Rev. 36 (1976). Dozens of other articles urging insurance companies to reform their claims practices have been written. They do not urge insurers to avoid dealing in bad-faith because it is immoral, but only because it subjects them to the possibility of large punitive damage judgments.[6]

Without the availability of a punitive award, most insurance consumers simply could not afford the expense of bringing widespread claims abuses to the attention of the courts. Punitive damage verdicts, along with other progressive reforms, are helping to regulate insurers who are being inadequately regulated by administrative agencies and the conduct of the entire insurance industry is grudgingly being reformed to conform to the reasonable interests and expectations of the public.

[4]Keenan and Gillespie, *The Insurer and the Tort of Intentional Infliction of Mental Distress*, 39 Ins. Couns. J. 335 (1972).

[5]Kornblum and Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 Best's Rev. 36 (1976).

[6]*See generally* Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979).

III. PUNITIVE DAMAGE REMEDIES HAVE BEEN SPARINGLY APPLIED AND HAVE NOT CREATED ANY "CRISIS" AS CLAIMED BY THE INSURANCE INDUSTRY.

Because punitive awards further the purposes described above, their benefit to society is clear and substantial. Thus, even if the availability of such awards imposed substantial costs on insurers, the benefits of punitive damages would justify those costs. In fact, however, the evidence indicates that such awards have been applied sparingly and selectively, with minimal costs to the industry as a whole.

In February 1987, for example, the Texas State Board of Insurance analyzed 3,367 claims that had been closed in Texas between November 1983 and December 1986. The total paid out in those cases was $487,703,243; the total paid out in punitive damages was $100,000, or about 1/50 of 1% of the total. Texas State Board of Insurance, Texas Liability Insurance Closed Claim Study 89 (1987);. Punitive damages were assessed in 6/10 of 1% of general liability claims, and 2/10 of 1% of medical malpractice claims. *Id.* at 32.

Similarly, Aetna Insurance Company also conducted a study which concluded that the cost of punitive damages was minimal. In order to determine the effect on its claim costs of Florida's new "tort reform" law, which included limitations on punitive damages, Aetna analyzed 105 claims it had recently closed. In submitting to the Florida Insurance Commissioner the analysis which demonstrated that the new law would have no effect, Aetna explained that punitive damages had an impact on the claim settlement value in only 2 of the 105 cases. It estimated the total impact to be less than $15,000 — less than 1/10 of 1% of its total indemnity payments. Letter from Thomas L. Rudd, Superintendent, Insurance Department Affairs — Commercial Lines, to Charlie Gray, Chief, Bureau of Policy and Contract Review, Attachment entitled "*Bodily In-*

jury Claim Cost Impact of Florida Tort Law Change," Aug. 8, 1986.

A survey of jury verdicts from over 30 jurisdictions in 10 states by the American Bar Foundation confirms the Aetna and Texas findings. The Foundation found that the percentage of plaintiff's verdicts that included a punitive damage component ranged from 0% in four jurisdictions to a high of 21.6% in Cobb County, Georgia. The percentage for New York City, Cook County, and Los Angeles County — the three largest metropolitan areas in the nation — were 1.6%, 2.2%, and 8.6% respectively. American Bar Foundation, Preliminary Report of the Punitive Damages Project 10-11, Feb. 8, 1986. Similarly, a study of the punitive damage awards for the state of California as a whole during the years 1980-1984 revealed such awards in only 5.1% of trials. Institute for Civil Justice and The Rand Corporation, "Punitive Damages: Empirical Findings and Due Process Considerations," November 6, 1989.

Finally, the Rand Corporation's Institute for Civil Justice, which receives approximately half its funding from the insurance industry,[7] Rand Institute for Civil Justice, Contributions History, Sept. 7, 1984; acknowledges that only about half the amount awarded as punitive damages is ultimately paid out,[8] The National Law Journal, "Study Says Punitive Awards Aren't Excessive," November 27, 1989; that punitive damage judgments are most frequent where defendants were found

[7] Rand Institute for Civil Justice, *Contributions History*, Sept. 7, 1984.

[8] Nor are punitive damage judgments any more prevalent in the area of product liability, nor any more likely to be paid before substantial appellate review. A recent study by the General Accounting Office prepared for the House Subcommittee on Commerce, Consumer Protection, and Competitiveness revealed only 12 punitive awards in the 305 cases studies which went to verdict. ***In all 12 cases, appellate courts reversed or remanded for retrial the punitive damage award. The National Law Journal***, "Study Says Punitive Awards Aren't Excessive," November 27, 1989.

to have intentionally harmed plaintiffs, and that most punitive damage judgments are modest.[9]

In short, the benefit of punitive damage is enormous while the cost is minimal. While the insurance industry in recent years has launched a public relations campaign against the legal system in general and punitive damages in particular,[10] the

[9] Rand Institute for Civil Justice, *"Punitive Damages: Empirical Findings,"* (1987) reported in Liability Week, March 30, 1987, at 2.

[10] In December 1984, for example, the Insurance Information Institute (III), the industry's public relations arm, launched what it called an "effort to market the idea that there is something wrong with the civil justice system in the United States." National Underwriter, Dec. 21, 1984, at 2. Pursuant to that effort it sent a kit on the "civil justice crisis" to insurance executives and agents urging them to tell their policyholders and the media that "Insurers have no recourse but to cut back on liability insurance until improvements in the civil justice system will create a fairer distribution of liability, reduce the number of lawsuits and create a climate in which insurance can operate more predictably." Insurance Information Institute, "Outline for Speech: Crisis in the Civil Justice System," at 7, attachment to Memorandum from Mechlin D. Moore, President, Insurance Information Institute, to State Presidents and Senior Staff Executives of the Professional Insurance Agents, Nov. 11, 1985. Soon thereafter, the III announced a new $6.5 million television and magazine advertising campaign designed, in the III's words, "to change the widely-held perception that there is an insurance crisis to a perception of a lawsuit crisis." Journal of Commerce, March 19, 1986, at 1, 20. The ads featured polio victims, mothers, ministers and high school athletes stating that "doctors are afraid to deliver babies, clergy are becoming reluctant to counsel their congregations, and high schools are thinking about closing down their sports programs" because of the "lawsuit crisis." E.g. Insurance Information Institute, "No One is Immune From the Lawsuit Crisis," The Washington Post Magazine, June 22, 1986. This year, amicus Aetna has been running similar ads. see, e.g., The Wall Street Journal, Jan. 23, 1987, at 21. Johnson & Higgins has also run similar ads. E.g., Johnson & Higgins, "Insurance is Getting Killed in Self-Defense."

Ironically, now that "tort reforms" have been enacted in several states the insurance industry has found that "the impact of the [tort] changes generally ranged from marginal to imperceptible." Insurance Services Office, Inc., Claim Evaluation Project, at 4 (1987). *See also* "No Florida Savings Seen from Tort Law Reform," Journal of Commerce, Oct. 21, 1986 at 1A.

empirical evidence demonstrates that the industry has been trying to "cry wolf."

A recent analysis of the so-called insurance "crisis" by a business publication states:

> During the 1986 crisis, the industry embarked on a splashy public relations campaign proclaiming that the "insurance crisis" was really a "lawsuit crisis." Some three dozen states did make minor changes in the law. But the insurance crisis has abated without help from an overhaul of the nation's civil justice system.
>
> Cool analysis is discrediting last year's horror stories about an epidemic of multimillion-dollar jury awards for relatively little cause. In a sample of 359 cases in the 1982-85 period, mostly involving product liability, punitive damages were "insignificant," according to a study published by the American Enterprise Institute. "The civil litigation system is stable," says Mark Peterson of the Rand Institute for Civil Justice. Only in mass toxic tort cases, notably those involving asbestos, is potentially enormous cost a real concern. (Emphasis added.)

Business Week, May 25, 1987, Finance-Insurance at 123;. The industry's alleged punitive damage "crisis" is no more legitimate than the industry's claims of financial distress.[11]

[11] An investigation by the Government Accounting Office, Congress' investigative arm, found that the insurance industry was healthy and that insurers earned after tax profits of 19 Billion Dollars in 1986, when the insurance "crisis" was at its peak. "The industry's earnings improved from $9.7 billion in 1985 to about $19 billion in 1986." Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987, page 4.

Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 987, page 4.

Other studies, such as the Preliminary Report of the Punitive Damages Project by the American Bar Foundation in 1986 used a statistical analysis and found the following:

> Perhaps what is most interesting . . . in light of the claims made about the incidence of punitive damage awards, is how low the percentage of punitive awards is in a number of sites. For instance, the percentage of reported verdicts in which the plaintiff wins money that include punitive awards is only 1.6% in New York City (all five counties making up New York City combined), 2.2% in Cook County, County, Illinois (which includes Chicago), and 8.6% in Los Angeles County, California. These three sites represent the three largest cities in the country, and they do not appear, generally speaking, to be facing a punitive damages storm. Punitive damages, in terms of their incidence, are unusual in these sites.
>
> . . .
>
> These tables reflect one particularly important consistency — punitive damages are not routine across all causes of action (this, or course, may be driven in part by differences in the law). The higher percentages of reported verdicts in the money that include a punitive award are clustered, typically, in a small set of causes of action: personal violence, fraud, false arrest, and insurance bad faith. . . .
>
> . . . .
>
> [T]hese preliminary findings are sufficient to call into question many of the claims made in both profes-

> sional circles and the mass media about punitive damages as well as the civil justice system generally. Punitive damages are not, in the sites we have studied at least, routine, nor are they necessarily awarded in amounts that boggle the mind. Relatively high percentages of verdicts with punitive damages appear in only a few sites, yet the median awards are relatively low in these sites. Punitive damages appear to be clustered in certain types of cases, ones that might be expected given the purposes of punitive damages. Extremely high dollar awards do not appear to be the norm, and they tend to appear in only a handful of causes of action which do not account for large proportions of the case load and in which plaintiffs are not as likely to win any money at all.

The insurance industry's concern over the number and size of punitive damage verdicts is misplaced. Given the state of the economy and particularly the healthy financial condition of the insurance industry, it would be expected that the amounts of such verdicts would increase each year. Every state has standards for assessment of punitive damages. One of the universal standards is that in determining the amount necessary to deter, the wealth of the defendant may be considered. Indeed, for punitive damages to fulfill the function of deterrence, it is necessary that such an assessment be considered in relation to the wealth of the defendant. "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National General Corp.*, 13 Cal.3d 43, 529 P.2d 608, 624 (1974).

An examination of the financial history of major insurance companies readily explains why the punitive damage trend would necessarily increase in amount if the deterrent purpose

of such damages is to be accomplished. For example, one company which writes virtually every line of insurance more than doubled its wealth over a 10 year period from almost two billion to over four and a half billion dollars. Its 10 year financial history is as follows:

ALLSTATE INSURANCE COMPANY

Year	**Net Worth "Surplus'** (In Dollars)
1979	1,981,089,058
1980	2,371,135,879
1981	2,395,168,905
1982	2,822,164,434
1983	3,197,752,369
1984	3,229,029,379
1985	3,676,523,111
1986	4,081,689,528
1987	3,939,240,438
1988	4,154,135,463
1989	4,524,478,559

Source: Best Insurance Reports, and the 1989 Allstate Annual Financial Statements filed with the Arizona Department of Insurance.

Using an insurer's present net worth of 4 Billion Dollars, a punitive damage assessment of $1,000,000 for fraud or malice or intent to harm could hardly be considered excessive. The same ratio of punishment to a person with net worth of $10,000 would be $2.50; to a person with a net worth of $100,000 would be a punitive assessment of $25.00; and to a person or company with net worth of $1,000,000, an equivalent punitive assessment would be $250.00. Insurance companies or other wealthy wrongdoers cannot be given preferential and unequal treatment merely because they possess great wealth.

Increases in the number and amount of punitive damage verdicts would also be expected over the past 10 years because of the evolution of the law and the increased awareness and knowledge by the courts of commercial torts. Not only has there been heightened recognition that intentional and profitable civil misconduct should not be protected or condoned, but the civil justice system through reported decisions has educated the courts regarding dishonest business schemes which were not recognized 10 or 15 years ago. Each reported insurance bad faith case seems to uncover additional schemes used to cheat policyholders of the protection they had purchased.

An example is an unfair claims practice which was discovered ten years ago in a state which did not recognize insurance bad faith. The practice therefore went unpunished. *Hoffman v. Allstate Ins. Co.*, 85 Ill.App.3d 631, 407 N.E.2d 156 (1980). In *Hoffman*, the company used a "cleanup" deduction on a total loss auto collision claim to reduce pay-out, and got away with it, as explained in the case:

> [O]ne of the defendant's adjusters, Jack Dooley, informed plaintiff that defendant deemed the car a total loss; he tendered and plaintiff accepted a check for $116.37 in full payment of the loss pursuant to the collision coverage Dooley explained . . . this figure; included . . . deduction of $55 which Dooley said was for "dealer preparation and shampoo," When plaintiff asked Dooley why such a deduction was made on a totally destroyed car, Dooley responded with words to the effect that "Allstate always does that." The check was returned uncashed to defendant on October 20, 1978. Plaintiff twice requested the location of the car for the purpose of having it appraised and apparently was never given this information.

Id. 407 N.E.2d at 157.

The Illinois Appellate Court, not recognizing insurance bad faith, affirmed the lower court dismissal of tort claims and punitive damages, and stated:

> Count III sounds in tort for fraud, alleging that defendant made "spurious" deductions from the retail value of the car and induced the plaintiff to accept the $116.37 check by representing those deductions as being legitimate.
>
> . . . .
>
> [P]laintiff returned the $116.37 check to defendant uncashed. Consequently, no apparent injury resulted from any purported reliance on defendant's representations, and the dismissal of Count III was proper.

Id. 407 N.E.2d at 158.

Thus, the plaintiff was left with an ineffective remedy. With no punitive damages available to him on the claim which remained under Illinois law, there was no incentive for the insurer to change its practices.

Several years later, the same practice, designed to cheat policyholders out of millions of dollars each year, was addressed in a state recognizing the tort of insurance bad faith and an appropriate punitive assessment was made for the purpose of deterring similar conduct in the future. *Hawkins v. Allstate Ins. Co., supra.* In *Hawkins*, the evidence showed that the same company was still using its "cleanup" deduction on every total loss collision claim for the purpose of increasing its profits at the expense of its insureds. The *Hawkins* Court found "the deceptive practices were established company policy" for up to 18 years before the time of trial. The practices were exposed and hopefully deterred in *Hawkins* only because

punitive damages were permissible with the advent of insurance bad faith as a tort in Arizona in 1981.[12]

Unfortunately, there will always be the company or individual who will seize upon the opportunity to turn a quick gain by imposing injury and deceit upon others. To those so disposed, punitive damages are the best response available. The availability of punitive damages in civil litigation will continue to serve the purpose of forewarning other defendants that their energy and finances are more prudently spent improving their own standards and conduct, and operating within existing legal principles. Those who are called upon to account for their conduct will always be assured their day in court, in accordance with historically accepted standards of civil due process. The present standards and procedure reconcile a defendant's interest in incurring monetary judgments only when supported by the evidence, with society's interest in insuring that corporate wrongdoing is both rectified and deterred in the future.

IV. PUNITIVE DAMAGE AWARDS ARE SUBJECT TO MORE EXACTING STANDARDS THAN THOSE FOR PAIN, SUFFERING AND EMOTIONAL DISTRESS WHICH ARE NOT HELD TO STRICT DUE PROCESS STANDARDS.

Petitioner contends that the system governing the award of punitive damages gives too much discretion to the jury or trial court, provides insufficient guidance to channel the decision, and argues that federal standards should be imposed to assure a minimum level of fairness. If these contentions are adopted by this Court, there is no logical reason why they would not also apply to compensatory damage awards for pain

[12] *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981).

and suffering and emotional distress. Yet no one is arguing, and research has uncovered no appellate decision where it has ever been argued, that the constitution requires federal standards for awards of pain and suffering and emotional distress. It is obvious that the constitutional attacks on punitive damages by Petitioner and Amici are really based on the amount of money involved and not on theoretical or intellectual grounds.

As shown below, punitive damage awards in Alabama and other states are subject to more exacting standards than those for pain, suffering and emotional distress. This Court must recognize that adoption of the rules proposed by Petitioner and Amici for punitive damages will surely have the chaotic and disastrous effect of calling into question all awards for pain and suffering and emotional distress, which are left to the largely unfettered discretion of juries.

This Court has long recognized that pain and suffering awards cannot be subject to any fixed standards:

> Damages, in such a case, must depend very much on the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted.

The Steamship City of Panama v. Phelps, 101 U.S. 453, 464 (1880). State courts have uniformly agreed.[13]

[13] See, e.g., Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967); ("There is no fixed measure of compensation in awarding damages for pain and suffering."); *Stirling Stores Co., Inc. v. Martin*, 238 Ark. 1041, 386 S.W.2d 711 (1965); ("We have said many times that there is no definite or satisfac-

Petitioner and Amici argue generally that current punitive damage law is unconstitutional because the tortfeasor does not know the size of the judgment that may be rendered against him because the jury is not guided by detailed standards, causing a wide disparity in judgments for similar conduct. No one seriously contends that the framers of the constitution contemplated that fixed standards and limits would be placed on punitive damage awards, and there is no consensus as to what such standards and limits should be nor who should decide them. But if the constitution truly requires such fixed standards for punitive damage awards, then there is no logical reason why such standards should not also apply to compensatory awards for pain, suffering, and emotional distress. For the tortfeasor who is merely negligent also does not know the size of the judgment that may be rendered against him, as verdicts for pain and suffering can vary significantly under similar facts. It is therefore virtually certain that adoption of specific strict standards for punitive damages will plunge the entire tort system into chaos, as jury verdicts for pain, suffering and/or emotional distress will be appealed on due process grounds throughout the country.

Punitive damage awards are already subject to several

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tory rule to measure compensation for pain and suffering, but the amount of damages must depend upon the circumstances of each particular case, and much must be left to the discretion of the jury.''); *Radloff v. State*, 136 Mich.App. 457, 356 N.W.2d 31 (1984); (''It is well-established that there are no absolute standards by which to measure personal injury awards, particularly awards for pain and suffering, which should rest within the sound judgment of the trier of fact.''); *Steel v. Bemis*, 121 N.H. 425, 431 A.2d 113 (1981); (''No one to our knowledge has been able to devise a formula by which compensation for pain and suffering can be determined with precision. . . In order to hold a verdict as excessive we must conclude that no reasonable person could have returned such a verdict.''); *Flory v. New York Central R.R.*, 170 Ohio St. 185, 163 N.E.2d 902 (1959); (''Such determination is susceptible to no mathematical or rule of thumb computation.'').

avenues of review to assure that they are justified: The plaintiff must prevail on a motion for directed verdict, the jury must exercise its discretion to award punitive damages, the verdict is subject to post-trial motions and review by the trial judge, and the judgment is subject to appeal. All of these procedures are designed to assure that the award is justified and not the result of the jury's passion or prejudice. *See, Hawkins v. Allstate Ins. Co., supra*, 152 Ariz. at 504, 733 P.2d at 1087. This Court also has recognized that judicial control is an adequate safeguard over excessive punitive damage awards. In rejecting a contention that a punitive damage award against a magazine publisher, limited only by the ''enlightened conscience'' of the community, constituted an effective prior restraint by giving the jury the power to destroy the publisher's business, this Court stated:

> We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted.
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> *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at 159-60, 87 S.Ct. at 1994.

Punitive damage awards are already subject to more exacting standards than those for pain and suffering and emotional distress. Alabama law, at issue in this case, requires the trial court to consider the following factors for a punitive damage award:

> (1) Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct, as well as the harm that actually has occurred. If the actual or likely harm is slight, the

damages should be relatively small. If grievious, the damages should be much greater.

(2) The degree of reprehensibility of defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit, and should be in excess of this profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Hammond v. City of Gadsden, 493 So.2d 1374, 1378-79 (Ala. 1986); *Green Oreal Company v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989). These standards far exceed those for compensatory awards for pain, suffering and emotional distress, which typically are upheld unless the amount "shocks the conscience" of the court.

Just as there can be no mathematical formula or set standards for pain and suffering awards, there can be none for punitive damages. Both depend on the facts and circumstances of each particular case. Judicial control adequately safeguards against excessive punitive damage awards. The Due Process Clause does not require anything more.

V. EVERY COURT THAT HAS CONSIDERED THE QUESTION HAS REJECTED THE CONTENTION THAT THE DUE PROCESS CLAUSE REQUIRES STRICTER STANDARDS FOR PUNITIVE DAMAGE AWARDS.

As noted above, this Court has already rejected the argument that a punitive damage award limited only by the "enlightened conscience" of the community was unconstitutional, by finding that judicial control over excessive jury verdicts is an adequate safeguard. *Curtis Publishing Co. v. Butts*, *supra*. That case was decided on First Amendment grounds, so it is true that this Court has yet to decide whether stricter standards are necessary in private civil punitive damage cases to satisfy the Fourteenth Amendment guarantee of due process.

Courts in several jurisdictions, however, have squarely addressed this question and they have uniformly rejected the contention that due process requires stricter standards for punitive damage awards. These decisions are based on two grounds. First, civil actions, even when punitive in nature, do not require the constitutionally-mandated safeguards provided in criminal actions, *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835, 852 (1987), cert. denied, 486 U.S. 1036, 108 S.Ct. 2023, 100 L.Ed.2d 610 (1988); *Toole v. Richardson-Merrill, Inc.*, 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967); *Unified School*

District No. 490 v. Celotex Corp., 6 Kan.App.2d 346, 629 P.2d 196 (1981). Second, the safeguards already in effect adequately provide due process of law, *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989), petition for cert. filed (No. 89-1303); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979); *Egan v. Mutual of Omaha Ins. Co.*, 133 Cal.Rptr. 899, 914-15 (Cal.App. 1976); *Kink v. Combs*, 28 Wis.2d 65, 135 N.W.2d 789, 797 (1965); *Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 405, 89 Cal.Rptr. 78 (1970). At least one opinion is based on both of these rationale, *Olson v. Walker*, 162 Ariz. 174, 781 P.2d 1015, 1022 (App. 1989).

The two most recent of these decisions are particularly noteworthy. In *Eichenseer v. Reserve Life*, the Fifth Circuit Court of Appeals noted that no circuit court had yet ruled on the applicability of the due process clause, but decided that it need not do so because no due process violation existed on the facts of the case before it. The court based this conclusion on the fact that well-established Mississippi law of insurance bad faith gave the insurer notice that its conduct could subject it to punitive damages liability, and in fact a punitive damages award had previously been awarded against the insurer for conduct similar to that in the instant case. The court also noted that juries are not given unbridled discretion to award punitive damages under Mississippi law, but are subject to both instructions on the proper bases of awards and review by the trial and appellate courts.

In addition to citing several of the above cases, the Arizona Court of Appeals in *Olson v. Walker* found it significant that no *governmental* action resulted in the taking of defendant's property:

> Obviously, a state or governmental interest is served when a wrongdoer is punished and others are deterred from similar conduct. However, for due process

> to apply, the government must have exercised its power to further that interest, which, in this case, it did not do. This was a civil action between private parties. A jury awarded the punitive damages without any involvement by the state, other than that the award was obtained through the use of the state court system. This does not, in our view, amount to governmental action.

162 Ariz. at 182, 781 P.2d at 1023.

Petitioners and Amici are asking this Court to take away a State's right to control egregious conduct within its borders, and to overrule established precedent by adopting a position that no court—anywhere—has ever adopted. This Court should agree with the cases cited above in finding that the safeguards provided in criminal cases do not apply in private actions for punitive damages, and that the standards and safeguards already in place are sufficient to provide defendants with due process.

CONCLUSION

If the insurance consumer is to have any effective protection against corporate misconduct, the punitive damage remedy must be maintained and strengthened. Otherwise, (s)he is defenseless against a $400 billion industry exempt from federal regulation and only ineffectively regulated by state governments.

The courts, and ultimately this Court, are the last best hope of the insurance consumer. As said over 100 years ago in *Goddard v. Grand Trunk Ry.*, 57 Me. 202 (1869): "If the courts will . . . let the doctrine of exemplary damages have its legitimate influence . . . great and growing evils will be very much lessened."

Due process in a private, state civil case involving punitive damages does not require anything more than the standards and judicial control already in place in the state courts. In addition, any newly found requirement that due process requires the amount of punitive damages to be limited to a mathematical formula will have the chaotic effect of immediately calling into question all compensatory awards for pain, suffering and emotional distress.

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